

IN THE NEBRASKA COURT OF APPEALS

MEMORANDUM OPINION AND JUDGMENT ON APPEAL

STACY V. GREAT LAKES AGRI MKTG.

NOTICE: THIS OPINION IS NOT DESIGNATED FOR PERMANENT PUBLICATION
AND MAY NOT BE CITED EXCEPT AS PROVIDED BY NEB. CT. R. APP. P. § 2-102(E).

MICHAEL E. STACY, APPELLANT,
V.
GREAT LAKES AGRI MARKETING, INC., APPELLEE.

Filed October 18, 2011. No. A-10-1165.

Appeal from the Workers' Compensation Court. Affirmed.

Jeffrey D. Patterson, of Bartle & Geier Law Firm, for appellant.

D. Steven Leininger and Sonya K. Koperski, of Leininger, Smith, Johnson, Baack,
Placzek & Allen, for appellee.

IRWIN, CASSEL, and PIRTLE, Judges.

PIRTLE, Judge.

INTRODUCTION

Pursuant to this court's authority under Neb. Ct. R. App. P. § 2-111(B)(1) (rev. 2008), this case was ordered submitted without oral argument. Michael E. Stacy filed an amended petition for modification in the Nebraska Workers' Compensation Court alleging that he had sustained a material and substantial increase in incapacity due solely to his injury of July 21, 2004, entitling him to a modification of his prior workers' compensation award. The trial court was not persuaded that Stacy sustained an increase in incapacity and declined to modify the prior award. The review panel affirmed in part, reversed in part, and remanded in part. Stacy appeals. Based on the reasons that follow, we affirm.

BACKGROUND

Stacy suffered an injury to his right knee on July 21, 2004, as a result of an accident arising out of and in the course and scope of his employment with Great Lakes Agri Marketing, Inc. As a result of Stacy's injury, he developed thrombophlebitis (deep vein thrombosis) and

complex regional pain syndrome. From his thrombophlebitis, he developed blood clots which require anticoagulation therapy for life. He suffers from burning pain throughout his right leg and right foot. Stacy received indemnity benefits for a 100-percent loss of use of his right lower extremity, but the Workers' Compensation Court rejected his argument that complex regional pain syndrome and anticoagulation therapy were whole body injuries entitling him to disability benefits based on his loss of earning capacity. The Nebraska Supreme Court affirmed this finding in *Stacy v. Great Lakes Agri Mktg.*, 276 Neb. 236, 753 N.W.2d 785 (2008).

After the original award, Stacy began experiencing further symptoms. In the summer of 2007, Stacy began having pain in his right buttock, right hip, and into his back. He sought medical attention.

On December 22, 2008, Stacy filed an amended petition for modification alleging that since the trial in October 2006, he has suffered from and has received medical treatment for right hip and low-back pain, which is the proximate result of the marked atrophy of his right lower extremity. He further alleged that he is also suffering from, and receiving medical treatment for, depression, which condition is a proximate result of his significant pain and disability resulting from the condition of his right lower extremity. He alleged that as a direct and proximate result of his right hip pain, low-back pain, and depression, he has experienced a material and substantial increase in incapacity due solely to his work-related injury, entitling him to a modification of the workers' compensation award.

On September 15, 2009, a modification hearing was held on Stacy's amended petition for modification. The evidence showed that in the summer of 2007, Stacy began experiencing pain in his right buttock, right hip, and into his lower back. On July 31, he saw Dr. Mark Meyer with Western Regional Orthopedic Center for hip and back pain. Meyer's impression was that Stacy had "[r]eflex sympathetic dystrophy, right lower extremity with a recent flare-up" and "[t]rochanteric bursitis, probably causing the [reflex sympathetic dystrophy] flare." Meyer gave him an injection in his hip for the bursitis and prescribed pain medication. Meyer told Stacy to return in 2 to 3 weeks.

On August 15, 2007, Stacy returned to Western Regional Orthopedic Center and was seen by Dr. Bryan Scheer. At that time, Stacy reported pain in his right hip, going into his buttock and down his leg. Scheer reported that Stacy's leg was "difficult to examine because of the sequelae from the reflex sympathetic dystrophy and his post-phlebotic syndrome." Scheer's impression was that Stacy's pain may be radicular. There is no mention of back pain reported by Stacy during the visit, and the x rays of Stacy's spine were "essentially normal." Scheer recommended an MRI, which was never done because the insurance provider for Great Lakes Agri Marketing would not authorize it.

The record contains a letter dated January 17, 2008, written by Scheer to Stacy's attorney in which he stated:

[W]ith . . . Stacey's [sic] significant disability in his right lower extremity, the way he ambulates, the way he is supposed to use his leg, I think any related hip radicular pain or even low back pathology could be at least partially related to the sequelae from his injury, at least within a degree of medical certainty.

On September 13, 2007, Stacy saw Dr. William Packard for a checkup in regard to his anticoagulation medication. Packard was the doctor Stacy had gone to on a regular basis in the past to monitor his medication levels, even though Packard's principal area of practice was oncology. Prior to the September 13 visit, Packard had not seen Stacy since March 2006. Packard's notes from the September 13 visit state:

The pain in [Stacy's] right leg is worse but is especially bad in his hip and lower back and I suspect this is not from the injury but a direct result of the unstable way which he is able to walk. Thus, indirectly it is clearly a result of his previous injury.

Packard made no treatment or diagnostic recommendations regarding Stacy's hip and back pain. He only made a change regarding Stacy's anticoagulation therapy.

In a letter written by Packard following Stacy's September 13, 2007, visit, Packard opined that "[Stacy] is unable to perform any kind of work due to an inability to stand or sit for any length of time." In Packard's deposition, he further explained, "He could barely walk to get into the room. There was no way he could do meaningful employment. Even sitting in a chair, his leg had to be in a certain position. And it could only be in a certain position for a limited amount of time." Packard further testified that his opinion of Stacy's employability was limited to 2007. He stated that he could not give an opinion as to whether or not Stacy could return to a sedentary type of job at the time of his deposition because he had not seen Stacy in nearly 2 years. Stacy also testified that Scheer and Packard would not know how he was doing at the time of the modification hearing because they had not seen him for 2 years.

Stacy returned to see Meyer at Western Regional Orthopedic Center on January 4, 2008, for a new problem involving little bumps on his toes. Stacy did not mention any back pain or hip pain to Meyer.

On August 18, 2008, Stacy went to see a new doctor, Dr. Edward Pelton. Stacy testified that he went to see Pelton because he was feeling depressed. Pelton testified that the reason for the August 18 visit was that Stacy needed someone to manage his anticoagulation medication. According to Pelton's office note, Stacy reported that he had a lot of pain in his foot and leg and that the pain was now encroaching up into his back. Pelton's assessment was reflex sympathetic dystrophy of his right leg with extreme atrophy and history of deep vein thrombosis. Pelton prescribed two medications for chronic pain. In his deposition, Pelton also testified that Stacy has chronic depression that is directly related to the pain in his right leg.

In a letter dated January 3, 2009, to Stacy's attorney, Pelton stated, "[B]ack pain has not been a problem that [Stacy] and I have discussed in any detail. I don't feel comfortable commenting on whether his leg pain contributes to his back pain."

On January 7, 2009, Stacy was seen by Dr. Matthew Simmons for a neurology consultation following an apparent seizure. Stacy filled out a questionnaire that asked about his present problems and his past medical history. Stacy did not disclose any present problems with, or any prior history of, back pain, hip pain, or depression. With regard to his past medical problems, Stacy reported deep vein thrombosis and reflex sympathetic dystrophy in his right leg. The form specifically asked whether Stacy had any musculoskeletal problems, which included neck or back pain, and Stacy's response was that he had weakness and muscle atrophy in his right leg.

Stacy testified that at the time of the modification hearing, he was still having hip and back pain. He also testified that he was not taking any prescription medication for pain and had not been for about 2 years prior to the hearing. Stacy testified that he understood that in October 2006, he was released to work in a sedentary position by Scheer. Stacy was offered a job at that time with Great Lakes Agri Marketing, which job he turned down. Stacy further testified that since October 2006, he has not actively looked for either a full-time or part-time job and he has not seen any vocational specialists.

Following the hearing, the trial court found that it was not persuaded that Stacy had sustained a material and substantial increase in incapacity due solely to his injury of July 21, 2004. The trial court found that any back pain and hip pain that Stacy has, as well as any depression he experiences, was not disabling. The court further stated that it was not persuaded that Stacy has any permanent restrictions or impairment from any back pain, hip pain, or depression and that therefore, Stacy failed to meet his burden of proving he now suffers permanent earning power loss. The trial court awarded no additional compensation for temporary or permanent disability.

The review panel affirmed in part, reversed in part, and remanded in part on the issue of causation. The review panel determined that the trial court had not made an express finding as to the causal connection between Stacy's back pain, hip pain, and depression and the accident at issue, and it remanded the matter back to the trial court for such finding. The review panel affirmed the trial court's finding that Stacy's back pain, hip pain, and depression were not disabling and, therefore, agreed with the trial court that Stacy failed to prove that he had sustained a material and substantial increase in incapacity.

ASSIGNMENT OF ERROR

Stacy assigns that the trial court erred in failing to consider the impact of his original scheduled member injury when assessing the disability resulting from his hip pain, back pain, and depression.

STANDARD OF REVIEW

Under Neb. Rev. Stat. § 48-185 (Reissue 2010), an appellate court may modify, reverse, or set aside a Workers' Compensation Court decision only when (1) the compensation court acted without or in excess of its powers; (2) the judgment, order, or award was procured by fraud; (3) there is not sufficient competent evidence in the record to warrant the making of the order, judgment, or award; or (4) the findings of fact by the compensation court do not support the order or award. *Bishop v. Speciality Fabricating Co.*, 277 Neb. 171, 760 N.W.2d 352 (2009).

Upon appellate review, the findings of fact made by the trial judge of the compensation court have the effect of a jury verdict and will not be disturbed unless clearly wrong. *Bishop v. Speciality Fabricating Co.*, *supra*. In testing the sufficiency of the evidence to support the findings of fact by the Workers' Compensation Court, the evidence must be considered in the light most favorable to the successful party, every controverted fact must be resolved in favor of the successful party, and the successful party will have the benefit of every inference that is reasonably deducible from the evidence. *Id.*

If the record contains evidence to substantiate the factual conclusions reached by the Workers' Compensation Court, an appellate court is precluded from substituting its view of the facts for that of the Workers' Compensation Court. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998).

ANALYSIS

We first note that the review panel found that the trial court failed to make an explicit finding regarding the cause of Stacy's hip pain, back pain, and depression, and remanded the matter back to the trial court for an express finding of causation. For purposes of our analysis, we will assume, as the trial court apparently did in its analysis, that Stacy's back pain, hip pain, and depression are causally related to his July 21, 2004, work-related accident.

Stacy assigns that the trial court erred in failing to consider the impact of his original scheduled member injury when assessing the disability resulting from his hip pain, back pain, and depression. Stacy relies on *Bishop v. Speciality Fabricating Co.*, *supra*; *Madlock v. Square D Co.*, 269 Neb. 675, 695 N.W.2d 412 (2005); and *Zavala v. ConAgra Beef Co.*, 265 Neb. 188, 655 N.W.2d 692 (2003), in support of his argument. In *Bishop* and *Madlock*, the Nebraska Supreme Court held that when a whole body injury is the result of a scheduled member injury, the member injury should be considered in the assessment of the whole body impairment. Similarly, in *Zavala*, the Nebraska Supreme Court held that when a worker sustains a scheduled member injury and a whole body injury in the same accident, it is permissible for the court to consider the impact of the scheduled member injury when assessing loss of earning capacity if the scheduled member injury adversely affects the worker such that loss of earning capacity cannot be fairly and accurately assessed without such consideration.

The present case can be distinguished from *Bishop*, *Madlock*, and *Zavala*. In each of those cases, the court considered the impact of a scheduled member injury in assessing the loss of earning capacity, after determining that the worker suffered a disabling whole body injury. Impairments to the body as a whole are compensated in terms of loss of earning power or capacity. *Zavala v. ConAgra Beef Co.*, *supra*. In the instant case, the court did not assess loss of earning capacity because the trial court determined that Stacy did not have any disability from the back pain, hip pain, and depression and that thus, Stacy had not suffered a whole body injury and was not entitled to compensation for loss of earning capacity. *Bishop*, *Madlock*, and *Zavala* did not require the court to take Stacy's scheduled member injury into account when determining if Stacy's back pain, hip pain, and depression were disabling. Stacy's assignment of error is without merit.

Further, unlike *Bishop*, *Madlock*, and *Zavala*, Stacy was seeking a modification of his previous workers' compensation award and had to prove an increase in incapacity. Neb. Rev. Stat. § 48-141 (Reissue 2010) provides, in pertinent part, that "the amount of any agreement or award . . . may be modified . . . on the ground of increase or decrease of incapacity due solely to the injury." To obtain a modification, the applicant must prove, by a preponderance of evidence, that the increase or decrease in incapacity was due solely to the injury resulting from the original accident. *Starks v. Cornhusker Packing Co.*, 254 Neb. 30, 573 N.W.2d 757 (1998). In proving the increase or decrease in incapacity, the applicant must prove there now exists a material and substantial change for the better or worse in the condition--a change in circumstances that

justifies a modification, distinct and different from the condition for which the adjudication had previously been made. *Id.*

The trial court held that it was not persuaded that any back pain, hip pain, or depression that Stacy experiences is disabling or results in permanent impairment or restrictions. It found that Packard's opinion in September 2007, that Stacy could not be meaningfully employed, was an expression of an opinion that Stacy could not work because of the condition of his leg. The court stated, "The Court can determine no medical opinion that specifically addresses the fact that [Stacy] has experienced any material and substantial change in his incapacity because of these new complaints of hip and back pain since October 24, 2006." The court further found that although there was evidence that Stacy was receiving medication for depression, there was no evidence that the depression is disabling.

The compensation court's findings of fact will not be disturbed unless clearly wrong. *Starks v. Cornhusker Packing Co., supra*. Determining whether an increase or decrease of incapacity has occurred is a finding of fact. *Id.* We also note that if the record contains evidence to substantiate the compensation court's factual conclusions, an appellate court is precluded from substituting its own view of the facts. *Id.*

While Stacy may have experienced some additional pain and depression from the injury, there is not sufficient evidence to support Stacy's contention that the back pain, hip pain, and depression have caused a material and substantial change for the worse in his condition. This remains true whether the pain and depression are considered with or without Stacy's scheduled member injury. The findings of the trial court that Stacy's back pain, hip pain, and depression were not disabling and that Stacy failed to prove by a preponderance of the evidence that his incapacity had increased are supported by the record and are not clearly wrong. Stacy's assignment of error is without merit.

As previously noted, the review panel found that the trial court failed to make an explicit finding regarding the cause of Stacy's hip pain, back pain, and depression, and remanded the matter back to the trial court for an express finding of causation. Given our determination that Stacy failed to prove a material and substantial increase in his incapacity, there is no need for the trial court to make an express finding of causation.

CONCLUSION

We conclude that the trial court did not err in failing to consider the impact of Stacy's scheduled member injury when assessing the disability resulting from his hip pain, back pain, and depression, and did not err in finding that this pain and depression were not disabling. Accordingly, the decision of the review panel affirming the trial court's finding that Stacy failed to meet his burden to prove a material and substantial increase in incapacity due solely to his injury of July 21, 2004, is affirmed. Given our resolution of the appeal, a determination about causation by the trial court is unnecessary. The judgment of the review panel is affirmed.

AFFIRMED.